Chapter 3

Agency Regulations and Administrative Discretion

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Agency Regulations and Administrative Discretion

This chapter deals with certain topics in administrative law which, strictly speaking, are not "appropriations law" or "fiscal law. " Nevertheless, the material covered is so pervasive in all areas of federal law, appropriations law included, that a brief treatment in this publication is warranted. We caution that it is not our purpose to present an administrative law treatise, but rather to highlight some important "cross-cutting" principles that appear in various contexts in many other chapters. The case citations should be viewed as an illustrative sampling.

A. Agency Regulations

As a conceptual starting point, agency regulations fall into two broad categories. First, every agency head has the authority, largely inherent but also authorized generally by 5 U.S.C. !3301,[1] to issue regulations to govern the internal affairs of his or her agency. This statute is nothing more than a grant of authority for what are called "housekeeping" regulations. Chrysler Corp. v. Brown, 441 U.S. 281,309 (1979); NLRB v. Capitol Fish Co., 294 F.2d 868,875 (5th Cir. 1961). It confers "administrative power only." United States v. George, 228 U.S. 14,20 (1913); 54 Comp. Gen. 624,626 (1975). Regulations in this category may include such things as conflicts of interest, employee travel, or delegations to organizational components.

In addition, when Congress enacts a new program statute, it typically does not prescribe every detail of its implementation but leaves it to the administering agency to do so by regulation.[2] There are many reasons for this. It is often not possible to foresee in advance every detail that ought to be covered. In other cases, there may be a need for flexibility in implementation that is simply not practical to detail in the legislation. In many cases, Congress prefers to legislate a policy in terms of broad standards, leaving the details of implementation to the agency with program expertise.

[1] "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. ."

[2] Regulations of this type have traditionally been called "statutory regulations," as distinguished from "administrative regulations," such as those issued under 5 U.S.C. § 301. E.g., 21 Comp. Dec. 482 (1915). While the statutory vs. administrative terminology may be convenient shorthand in some contexts, its significance has been largely superseded by the Administrative Procedure Act. Courts today occasionally use the term "administrative regulations" in the broader sense of agency regulations in general. E.g., Rodway v. United States Dep't of Agricul-~, 514 F.2d 809,814 (D.C. Cir. 1975).

Finally, it is much easier for an agency to amend a regulation to reflect changing circumstances than it would be for Congress to have to go back and amend the basic legislation. Thus, agency regulations have become an increasingly vital element of federal law.

1. The Administrative Procedure Act

The key statute governing the issuance of agency regulations is the Administrative Procedure Act (APA), originally enacted in 1946 and now found in Title 5 of the United States Code, primarily sections 551–559 (administrative provisions) and 701-706 (judicial review).[3] The APA deals with two broad categories of administrative action: rulemaking and adjudication. Our concern here is solely with the rulemaking portions.

a. The Informal Rulemaking Process

The APA uses the term "rule" rather than "regulation." In the context of the APA, the issuance of a regulation is called "rulemaking." The term "rule" is given a very broad definition in 5 U.S.C. § 551(4):

> " '[R]ule' means the whole or any part of an agency statement of general *or* particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ."

It is apparent from this definition that a great many agency issuances, regardless of what the agency chooses to call them, are "rules."

The APA prescribes two types of rulemaking, which have come to be known as "formal" and "informal." Formal rulemaking under the APA involves a trial-type hearing (witnesses, depositions, transcript, etc.) and is governed by 5 U.S.C. §§ 556 and 557. This more rigorous, and today relatively uncommon, procedure is required only where the governing statute requires that the proceeding be "on the record." 5 U.S.C. § 553(c); United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973).

Most agency regulations are the product of informal rulemaking—the notice and comment procedures prescribed by 5 U.S.C. § 553. The

[3] For an excellent summary of the APA together with a useful bibliography, see Administrative Conference of the United States, Federal Administrative Procedure Sourcebook (1985). The Sourcebook is also particularly useful because it reprints in full the 1947 Attorney General's Manual on the Administrative Procedure Act, which has been called the government's "most authoritative interpretation of the APA." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Justice Scalia, concurring).

first step in this process is the publication of a proposed regulation in the Federal Register. The Federal Register is a daily publication printed and distributed by the Government Printing Office. 44 U.S.C. 51504.4 The agency then allows a period of time during which interested parties may participate in the process, usually by submitting written comments although oral presentations are sometimes permitted. Next, the agency considers and evaluates the comments submitted, and determines the content of the final regulation, which is also published in the Federal Register, generally at least 30 days prior to its effective date. 5 U.S.C. §§ 553(b)–(d).

Publication of a document in the Federal Register constitutes legal notice of its contents. 44 U.S.C. § 1507; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); 63 Comp. Gen. 293 (1984).

The agency is also required to publish a "concise general statement" of the basis and purpose of the regulation. 5 U.S.C. § 553(c). This is commonly known as the preamble, the substance of which appears in the Federal Register under the heading "Supplementary Information. "

The preamble is extremely important since it is the primary means for a reviewing court to evaluate compliance with section 553. The courts have cautioned not to read the terms "concise" and "general" too literally. Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). Rather, the preamble must be adequate:

"to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. "

Rodway v. United States Dep't of Agriculture, 514 F.2d 809,817 (D.C. Cir. 1975'). See also Home Box Office. Inc. v. FCC, 567 F.2d 9, 36 (D. C.. Cir. 1977), cert. denied, 434 U.S. 829; Automotive Parts, 407 F.2d at 338. As one court stated, "the agencies do not have quite the prerogative of obscurantism reserved to the legislatures. " United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977). The preamble does not, however, have to

[4]Indispensable though it may be, the Federal Register has been termed "voluminous and dull. " Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380,387 (1947) (Justice Jackson, dissenting).

address every item included in the comments. Id.; Automotive Parts, 407 F.2d at 338.

The preamble normally accompanies publication of the final regulation, although this is not required as long as it is sufficiently close in time to make it clear that it is in fact contemporaneous and not a "post hoc rationalization." Action on Smoking and Health v. Civil Aeronautics Board, 713 F.2d 795,799 (D.C. Cir. 1983); Tabor v. Joint Board for Enrollment of Actuaries, 566 F.2d 705,711 n.14 (D.C. Cir. 1977).

Apart from questions of judicial review, the preamble serves another highly important function. It provides, as its title in the Federal Register indicates, useful supplementary information. Viewed from this perspective, the preamble serves the same Purpose with respect to a regulation as legislative history does with respect to a statutes

Codifications of agency regulations are issued in bound and permanent form in the Code of Federal Regulations. The "c, F. R." is supplemented or republished at least once a year. 44 U.S.C. 61510. Unfortunately, with rare exceptions, the preamble does not accompany the regulations into the c. F.R., but is found only in the original Federal Register issuance. The C.F.R. does, however, give the appropriate Federal Register citation. Regulations on the use of the Federal Register and the C.F.R. are found in 1 C.F.R. Chapter I.

Agencies may supplement the APA procedures, but are not required to unless directed by statute. The Supreme Court has admonished that a court should:

"not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978). The Court repeated its caution the following year in Chrysler Corp. v. Brown, 441 U.S. 281,312-13 (1979)4

[5]The "legislative history" analogy may be extended to unpublished agency documents used in the preparation of a regulation, which maybe relevant in resolving ambiguities in the regulation See Deluxe Check Printers, Inc. v. United States, 5 Cl. Ct. 498,500-01 (1984).

The Court of Appeals for the District of Columbia Circuit, in Home Box Office, Inc. v. FCC, 567 F.2d at 35-36, has provided the following summary of the MM's informal rulemaking requirements:

"The A PA sets out three procedural requirements: notice of the proposed rulemaking, an opportunity for interested persons to comment, and 'a concise general statement of [the] basis and purpose' of the rules ultimately adopted. . . . As interpreted by recent decisions of this court, these procedural requirements are intended to assist judicial review as well as to provide fair treatment. for persons affected by *a* rule. . To this end there must be an exchange of views, information and criticism between interested persons and the agency, . . . Consequently, the notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based. Moreover, a dialogue is a two-way street: the opportunity to comment. is meaningless unless the agency responds to significant points raised by the public. ."

Against this backdrop, the Comptroller General has found that an agreement to issue, with specified content, a regulation otherwise subject to the APA, not only violates the APA but is invalid as contrary to public policy. B-212529, May 31, 1984. In effect, a promise to issue a regulation with specified content amounts to a promise to disregard any adverse public comments received, clearly a violation of the APA.

Prior to legislation enacted on November 29, 1990, proposed regulations were usually drafted by agency staff, based on the agency's own expertise. Nothing prohibited agencies from consulting with interested parties at this preliminary stage, but, with few exceptions, it was rarely done, The few agencies which did experiment with "negotiated rulemaking" found that it reduced the potential for court challenges to the final regulations. Congress provided a uniform statutory framework by enacting the Negotiated Rulemaking Act of 1990, Pub, L. No. 101-648, 104 Stat. 4969 (1990), which added a new 5 U.S.C. §§ 581–590. Under this legislation, a proposed regulation is drafted by a committee composed of representatives of the agency and other interested parties. An agency may use this procedure if it determines, among other things, that there are a limited number of identifiable interests that will be significantly affected by the regulation, and that there is a reasonable likelihood that a committee can reach a consensus without unreasonably delaying the rulemaking process. Once the proposed regulation is developed in this manner, it remains subject to the

APA's notice and comment requirements. The negotiated rulemaking procedure is optional, an agency's decision to use or not use it is not subject to judicial review, and use of the procedure does not entitle the regulation to any greater deference than it would otherwise receive. (The background information in the first part of this paragraph is taken from the report of the House Judiciary Committee, H.R. Rep. No. 461, 101st Cong., 2d Sess. 7-9 (1990).)

b. Informal Rulemaking: When Required

A great many things are required by one statute or another to be published in the Federal Register. One example is "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). Privacy Act notices are another example. 5 U.S.C. § 552a(e)(4). Other items required or authorized to be published in the Federal Register are specified in 44 U.S.C. § 1505. However, the mere requirement to publish something in the Federal Register is not, by itself, a requirement to use APA procedures.

As a starting point, anything that falls within the definition of a "rule" in 5 U.S.C. § 551(4) and for which formal rulemaking is not required, is subject to the informal rulemaking procedures of 5 U.S.C. § 553 unless exempt. This statement is not as encompassing as it may seem, since section 553 itself provides several very significant exemptions. These exemptions, said one court, "will be narrowly construed and only reluctantly countenanced. " New Jersey Dep't of Environmental Protection v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Be that as it may, they appear in the statute and cannot be disregarded.

For example, section 553 does not apply to matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). Several agencies, primarily in response to a recommendation by the Administrative Conference of the United States, have published in the Federal Register a statement committing themselves to follow APA procedures in these matters. To the extent an agency has done this, it has voluntarily waived the benefit of the exemption and must follow the APA. E.g., Alcaraz v. Block, 746 F.2d 593 (9th Cir. 1984); Humana of South Carolina, Inc. v. Califano, 590 F.2d 1070 (D.C. Cir. 1978); Rodway v. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); Herron v. Heckler, 576 F. Supp. 218 (N.D. Cal. 1983); Ngou v. Schweiker, 535 F. Supp. 1214 (D.D.C. 1982); B-202568,

September 11, 1981. If an agency has not waived its exemption with respect to the specified matters, it need not follow the APA.[6] California v. EPA, 689 F.2d 217 (D.C. Cir. 1982); City of Grand Rapids v. Richardson, 429 F. Supp. 1087 (W.D. Mich. 1977).

Another significant exemption, found in 5 U.S.C. § 553(b), is for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Again, much litigation has ensued over whether a given regulation is "substantive" or "legislative," in which event section 553 applies, or whether it is "interpretative," in which event it does not. See, for example, Guardian Federal Savings and Loan Ass'n v. FSLIC, 589 F.2d 658 (D.C. Cir. 1978); Joseph v. United States Civil Service Commission, 554 F.2d 1140 (D.C. Cir. 1977); Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974). As these cases demonstrate, the agency's own characterization of a regulation as interpretative is not controlling.[7]

A regulation which is subject to 5 U.S.C. § 553 but which is issued in violation of the required procedures (including a non-existent or inadequate preamble) stands an excellent chance of being invalidated. If the regulation is one the agency is required to issue, the courts will typically declare the regulation invalid, or "void" (e.g., W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987)), or vacate the regulation and remand it to the agency for further proceedings in compliance with the APA, the extent of the further proceedings depending on the degree of non-compliance.[8] If the regulation is authorized but not required, it will still be invalidated but the

[6]The exemption maybe unavailable to particular agencies or programs, in whole or in part, by virtue of some other statute, For example, Congress has required the Department of Energy to follow the APA with respect to public property, loans, grants, or contracts, although the Department may waive notice and comment upon finding that strict compliance is likely to cause serious harm to the public health, safety, or welfare. 42 U.S.C. §§ 7191(b)(3), (e).

[7]As should be apparent, the traditional classification of regulations as "statutory" or "administrative" is of little help in assessing the applicability of the APA. Most "administrative regulations" (regulations issued under the authority of 5 U.S.C. § 301) will be exempt from the APA not because somebody calls them "administrative," but because they will be matters "relating to agency management or personnel"or 'Yules of agency organization. procedure, orpractice." Substantive or legislative regulations will generally be "statutory," but so will most regulations relating to grants or loans, as well as many interpretative regulations

[8]E.g., Tabor v. Board of Actuaries, 566 F.2d at 712; Rodway v. Dep't of Agriculture, 514 F.2d at 817; Detroit Edison Co. v. EPA, 496 F.2d at 249. Occasionally, although this appears to be a minority position, a court may be willing to entertain further explanation from the agency in the form of affidavits or testimony. E.g., National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir. 1975).

agency will usually have the discretion to repromulgate under the correct procedures.[9]

Agency issuances may be called many things besides regulations: manuals, handbooks, instruction memoranda, etc. For purposes of determining applicability of the APA, the testis the substance and effect of the document rather than what the agency chooses to call it. E.g., Guardian Federal Savings and Loan Ass'n v. FSLIC, 589 F.2d at 666; Herron v. Heckler, 576 F. Supp. at 230; Saint Francis Memorial Hospital v. Weinberger, 413 F. Supp. 323,327 (N.D. Cal. 1976).

If agency in-house publications are inconsistent with "governing statutes-and regulations of the highest or higher dignity, e.g., regulations published in the Federal Register, they do not bind the government, and persons relying on them do so at their peril." Fiorentino v. United States, 607 F.2d 963,968 (Ct. Cl. 1979), cert. denied., 444 U.S. 1083.

2. Regulations May Not Exceed Statutory Authority

It is a fundamental proposition that agency regulations are bound by the limits of the agency's statutory and organic authority. An often quoted statement of the principle appears in the Supreme Court's decision in Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

To take an example of particular relevance to this publication, an agency may not expend public funds or incur a liability to do so on the basis of a regulation, unless the regulation is implementing authority given by law. A regulation purporting to create a liability on the part of the government not supported by statutory authority is invalid and not binding on the government. Atchison, Topeka & Santa Fe Railroad Co. v. United States, 55 Ct. Cl. 339 (1920); Holland-America Line v. United States, 53 Ct. Cl. 522 (1918); Illinois

[9]E.g., United States v. Garner, 767 F.2d 104, 123 (5th Cir. 1985); Joseph v. Civil Service Commission, 554 F.2d at 1157.

Central Railroad Co. v. United States, 52 Ct. Cl. 53 (1917). See also B-201054, April 27, 1981, discussed below. In other words, the authority to obligate or expend public funds cannot be created by regulation; the basic authority must be conferred by Congress.

Further illustrations may be found in the following decisions of the Comptroller General:

- Where the program statute provided that federal grants "shall be" a specified percentage of project construction costs, the grantor agency could not issue regulations providing a mechanism for reducing the grants below the specified percentage. 53 Comp. Gen. 547 (1974).
- Where a statute provided that administrative costs could not exceed a specified percentage of funds distributed to states under an allotment formula, the administering agency could not amend its regulations to relieve states of liability for overexpenditures or to raise the ceiling. B-178564, July 19, 1977, affirmed in 57 Comp. Gen. 163 (1977).
- Absent a clear statutory basis, an agency may not issue regulations establishing procedures to accept government liability or to forgive indebtedness based on what it deems to be fair or equitable. B-201054, April 27, 1981. See also B-118653, July 15, 1969.

See also Harris v. Lynn, 555 F.2d 1357 (8th Cir. 1977) (agency cannot extend benefits by regulation to class of persons not included within authorizing statute); Tullock v. State Highway Commission of Missouri, 507 F.2d 712,716-17 (8th Cir. 1974); Pender Peanut Corp. v. United States, 20 Cl. Ct. 447,455 (1990) (monetary penalty not authorized by statute cannot be imposed by regulation); 62 Comp. Gen. 116 (1983); 56 Comp. Gen. 943 (1977); B-201706, March 17, 1981.

3. "Force and Effect of Law"

A very long line of decisions holds that "statutory regulations" which are otherwise valid (that is, which are within the bounds of the agency's statutory authority) have the force and effect of law. E.g., 53 Comp. Gen. 364 (1973); 43 Comp. Gen. 31 (1963); 37 Comp Gen. 820 (1958); 33 Comp. Gen. 174 (1953); 31 Comp. Gen. 193 (1951); 22 Comp. Gen. 895 (1943); 15 Comp. Gen. 869 (1936); 2 Comp. Gen. 342 (1922); 21 Comp. Dec. 482 (1915).

The thrust of these decisions is that the regulations are binding on all concerned, the issuing agency included, and that the agency cannot waive their application on an ad hoc or situational basis. In view of developments in the law in recent years, stating the principle in terms of "statutory regulations" has become somewhat oversimplified.

In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the Supreme Court provided detailed instruction as to when an agency regulation is entitled to the "force and effect of law." The regulation "must have certain substantive characteristics and be the product of certain procedural requisites." 441 US. at 301. Specifically, the Court listed three tests which must be met:

- The regulation must be a "substantive" or "legislative" regulation affecting individual rights or obligations. Regulations which are interpretative only generally will not qualify. [10]
- The regulation must be issued pursuant to, and subject to any limitations of, a statutory grant of authority. For purposes of this test, 5 U.S.C. § 301 does not constitute a sufficient grant of authority. 441 U.S. at 309-11. (This testis discussed further under "Agency Administrative Interpretations" later in this chapter.)
- The regulation must be issued in compliance with any procedural requirements imposed by Congress. This generally means the APA, unless the regulation falls within one of the exemptions previously discussed. "

A regulation which meets these three tests will be given the "force and effect of law." A regulation with the force and effect of law is "binding on courts in a manner akin to statutes" (Chrysler Corp., 441 U.S. at 308); it has the same legal effect "as if [it] had been enacted by Congress directly" (Federal Crop Insurance Corp. v.

[10] This of course is the same distinction discussed earlier with respect to the applicability of informal rulemaking procedures under the APA. It has been pointed out that the term "legislative" is preferable to "substantive" because the latter can become confused with another distinction occasionally encountered, substantive vs. procedural, which has little value in the present context. A legislative rule maybe procedural, and an interpretative rule maybe substantive in the sense that it does not deal with an issue of procedure. See Joseph v. United States Civil Service Comm'n, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977). Professor Kenneth Culp Davis, in his Administrative Law Treatise, vol. 2, §7:9 (2d ed. 1979), also suggests that the term "substantive" in this context should be discontinued in favor of "legislative." Whichever term is used, the terminology can be misleading, as pointed out in Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1166 (7th Cir. 1982).

[11] See for example, B-226499, April 1, 1987, holding that an unpublished notice purporting to amend a published regulation did not have the force and effect of law.

Merrill, 332 U.S. 380,385 (1947)); it "is as binding on a court as if it were part of the statute" (Joseph v. United States Civil Service Commission, 554 F.2d 1140, 1153 (D.C.Cir. 1977)); it is "as binding on the courts as any statute enacted by Congress" (Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1165 (7th Cir. 1982)).

This is strong language. It cautions a reviewing court (or reviewing administrative agency) not to substitute its own judgment for that of the agency, and not to invalidate a regulation merely because it would have interpreted the law differently. A regulation with the force and effect of law is controlling, subject to the "arbitrary and capricious" standard of the APA (5 U.S.C. § 706). Batterton v. Francis, 432 U.S. 416,425-26 (1977); Guardian Federal Savings and Loan Ass'n v. FSLIC, 589 F.2d 658,664-65 (D.C.Cir. 1978); Joseph v. Civil Service Commission, 554 F.2d at 1154 n.26. A regulation will generally be found arbitrary and capricious—

"if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. "

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29,43 (1983).

Thus, rather than saying "statutory regulations have the force and effect of law," it is more accurate to say that "substantive or legislative regulations, issued pursuant to a grant of statutory authority and in compliance with the APA or other procedural statute as and to the extent applicable, have the force and effect of law." Such a regulation, as the numerous GAO decisions have pointed out, should be uniform in application, is binding on the government as well as any private parties affected, and, at least as a general proposition, cannot be waived on an ad hoc basis.

For cases applying the Chrysler standards in determining that various regulations do or do not have the force and effect of law, see Homer v. Jeffrey, 823 F.2d 1521 (Fed. Cir. 1987); St. Mary's Hospital, Inc. v. Harris, 604 F.2d 407 (5th Cir. 1979); Intermountain Forest Industry Ass'n v, Lyng, 683 F.Supp. 1330 (D. Wyo. 1988).

4. Waiver of Regulations

When you ask whether an agency can waive a regulation, you are really asking to what extent an agency is bound by its own regulations. If a given regulation binds the issuing agency, then the agency should not be able to grant ad hoc waivers, unless the governing statute has given it that authority and the agency has built it into the regulation. The question of whether an agency must follow its own regulations is somewhat broader than the question of waiver. However, we have chosen to treat them together because the answer, to the extent an answer can be said to exist at the present time, is basically the same.

A regulation with the "force and effect of law" is clearly binding on the agency. See also Section C.3 below. If the courts meant what they said about such regulations being treated essentially the same as statutes, then the agency should not be able to waive the regulation any more than it could waive the statute. The underlying philosophy—still valid—was expressed as follows in a 1958 GAO decision:

> "Regulations must contain a guide or standard alike to all individuals similarly situated, so that anyone interested may determine his own rights or exemptions thereunder. The administrative agency may not exercise discretion to enforce them against some and to refuse to enforce them against others." 37 Comp. Gen. 820,821 (1958).[12]

Even here, however, there may be room for some slight measure of discretion, at least with respect to certain types of regulation. For example, in American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970), the Court held that the Interstate Commerce Commission could deviate from a provision in what was at least a "statutory," if not a "legislative" regulation, stating that the regulations were "not intended primarily to confer important procedural benefits upon individuals," but were "mere aids to the exercise of the agency's independent discretion" (id. at 538-39).

The real problems arise when one enters the realm of regulations which do not have the force and effect of law. These may include regulations which were published in the Federal Register under APA procedures but which are classified as interpretative, as well as a

[12] Of course, the government has "prosecutorial discretion" in enforcing violations, and may select one case or a few cases to make its point. This is different from the point being made in the text, which is that an agency cannot follow its regulation when it feels like it and not follow it when it does not feel like it.

variety of unpublished agency documents, including internal publications such as manuals, handbooks, etc. There is a growing body of case law on whether regulations in this category are binding on the issuing agency. At the present time, the best answer we can give is that some are while others are not.

In some of the cases, the issue is stated as whether the given item constitutes a "regulation." E.g., Fairington Apartments of Lafayette v. United States, 7 Cl. Ct. 647 (1985), The thing to remember is that, in this specific context, the answer to that question determines only whether the item is binding on the agency in that case. It does not necessarily follow that an item found to be a "regulation" should have been published under APA procedures or that it has the force and effect of law. These are separate (although related) questions which, as discussed above, have their own tests and standards.

Early (and some not so early) GAO and Comptroller of the Treasury decisions viewed the waiver question as flowing essentially from the old statutory vs. administrative distinction. Thus, it has often been held that statutory regulations may not be waived. E.g., 60 Comp. Gen. 15, 26 (1980); 57 Comp. Gen. 662 (1978); 10 Comp. Gen. 242 (1930); B-233946.2, December 14, 1989; B-208610, September 1, 1983. See also the cases cited in the first paragraph under "Force and Effect of Law" above. Correspondingly, several decisions hold that "administrative regulations" can be waived. E.g., 4 Comp. Gen. 767 (1925); 1 Comp. Gen. 13 (1921); 26 Comp. Dec. 99 (1919); 21 Comp. Dec. 482 (1915). As a result of Supreme Court decisions in the 1950's, GAO modified its position somewhat in 51 Comp. Gen. 30 (1971), noting cautiously that the former distinctions "are no longer regarded as applicable in all respects" (whatever that means), Id. at 32.

The Supreme Court has also yet to articulate a clear standard. For example, in Morton v. Ruiz, 415 U.S. 199 (1974), the Court held the Bureau of Indian Affairs bound by a provision in an internal BIA manual which stated that directives relating to the public are published in the Federal Register in accordance with the APA. Based on this, the Court held ineffective another provision in the BIA manual, not published in the Federal Register, restricting eligibility for general assistance benefits. "Where," the Court said, "the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. " Id. at 235, Yet in Schweiker v. Hansen,

450 U.S. 785 (1981), the Court found a Social Security Administration claims manual not binding on the agency, in a case where an individual's eligibility for benefits was at stake. [13]

Without undertaking an extensive analysis, the best that can be said is that, at least where a purported waiver or deviation would be adverse to individuals, some non-legislative regulations may now be as binding on the agency as legislative regulations. Morton v. Ruiz, 51 Comp. Gen. 30 (1971). See also Massachusetts Department of Correction v. Law Enforcement Assistance Administration, 605 F.2d 21, 26 (1st Cir. 1979); B-184068, August 22, 1975. However, other types of non-legislative regulations, particularly where the regulations are for the primary benefit of the agency and failure to follow them would not adversely affect private parties, remain open to waiver. E.g., 60 Comp. Gen. 208, 210 (1981) (Urban Mass Transportation Administration internal guideline on evidence of grantee financial capability).

An interesting variation occurred in Health Systems Agency of Oklahoma, Inc. v. Norman, 589 F.2d 486 (10th Cir. 1978). An application for designation as a Health Systems Agency was submitted to the Department of Health, Education, and Welfare 55 minutes past the deadline announced in the Federal Register, because the applicant's representative overslept. HEW refused to accept the application. Finding that the deadline was not statutory, that its purpose was the orderly transaction of business, and that internal HEW guidelines permitted some discretion in waiving the deadline, the court held HEW's refusal to be an abuse of discretion.

What seems clear is that a "form over substance" approach will be rejected, and what an agency chooses to call its regulation is largely immaterial. As stated in one GAO decision:

"That the Bureau's policy and procedure memoranda were never intended as 'regulations' is of no particular import since whether or not they are such must be determined by their operative nature." 43 Comp. Gen. 31,34(1963).

[13] "[T]here is no doubt that Connelly failed to follow the Claims Manual in neglecting to recommend that respondent file a written application and in neglecting to advise her of the advantages of a written application. But the Claims Manual is not a regulation. It has no legal force, and it does not bind the SSA." 450 U.S. at 789.

In assessing the binding nature of a non-legislative regulation or other agency document, the language of the document itself is obviously an important starting point. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-38 (D.C. Cir. 1986). The issuing agency's intent is also an important factor. Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); New England Tank Industries of New Hampshire, Inc. v. United States, 861 F.2d 685 (Fed. Cir. 1988); Fairington Apartments of Lafayette v. United States, 7 Cl. Ct. 647 (1985). Intent is ascertained by examining "the provision's language, its context, and any available extrinsic evidence." Doe v. Hampton, 566 F.2d 265,281 (D.C. Cir. 1977).

Factors which may provide some indication of intent, although they are not dispositive, are whether the item has been published in the Federal Register (failure to do so suggests an intent that the item be non-binding), and, more significantly, whether it has been published in the Code of Federal Regulations (under 44 U.S.C. § 1510, the C.F.R. is supposed to contain only documents with "legal effect"). Brock v. Cathedral Bluffs, 796 F.2d at 538-39.

For further reading on this interesting and apparently still evolving topic, see:

- Peter Raven-Hansen, Regulatory Estoppel: When Agencies Break Their Own 'Laws,' 64 Tex. L. Rev. 1 (1985).
- Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629 (1974).

5. Amendment of Regulations

While waiver of regulations can be problematic, it has long been recognized that the authority to issue regulations includes the authority to amend or revoke those regulations, at least prospectively. E.g., 21 Comp. Dec. 482, 484 (1915). This common-sense proposition is-reflected in the APA's definition of rulemaking as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

An amendment to a regulation, like the parent regulation itself, must of course remain within the bounds of the agency's statutory authority. B-221779, March 24, 1986; B-202568, September 11, 1981.

As the APA's definition of rulemaking makes clear, an amendment to a regulation is subject to the APA to the same extent as the parent regulation. Thus, if a regulation is required to follow the notice and comment procedures of 5 U.S.C. § 553, an amendment or repeal of that regulation must generally follow the same procedures. Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425,446 (D.C. Cir. 1982); Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974); B-221779, March 24, 1986.

If a regulation is subject to the APA's informal rulemaking requirements, an unpublished agency document which purports to amend that regulation is invalid and does not bind the government. Fiorentino v. United States, 607 F.2d 963, 968 (Ct. Cl. 1979), cert. denied, 444 U.S. 1083; 65 Comp. Gen. 439 (1986); B-226499, April 1, 1987.

It is possible to have a regulation subject to 5 U.S.C. § 553, with an amendment to that regulation which falls within one of the exemptions, in which event the amendment need not comply with the APA procedures. See Detroit Edison, 496 F.2d at 245, 249; B-202568, September 11, 1981; 5 Op. Off. Legal Counsel 104 (1981). Although we have found no cases, logic would suggest that the converse is also possible—an amendment to an interpretative regulation which rises to the level of a substantive or legislative rule.

If a parent regulation is exempt from compliance with the APA but the agency has, without generally waiving the exemption, published it under APA procedures anyway, the voluntary compliance will not operate as a waiver. The agency may subsequently amend or repeal the regulation without following the APA. Baylor Univ. Medical Center v. Heckler, 758 F.2d 1052 (5th Cir. 1985); Malek-Marzban v. Immigration and Naturalization Service, 653 F.2d 113 (4th Cir. 1981); Washington Hospital Center v. Heckler, 581 F. Supp. 195 (D.D.C. 1984).

6. Retroactivity

A number of decisions have pointed out that amendments to regulations should be prospective only. E.g., 35 Comp. Gen. 187 (1955); 32 Comp. Gen. 315 (1953); 2 Comp. Gen. 342 (1922); 21 Comp. Dec. 482 (1915). The theory is that amendments should not affect rights or reliance accruing under the old regulation. While these are still crucial concerns, the law is not quite that simple.

At the outset, it maybe useful to understand the difference between "primary" and "secondary" retroactivity. Primary retroactivity changes the past legal consequences of past actions, Secondary retroactivity changes the future legal consequences of past actions, See generally Bowen v. Georgetown University Hospital, 488 U.S. 204, 219-20 (1988) (Justice Scalia, concurring).

To take a concrete illustration, when Individual Retirement Accounts were first authorized, most people could take an income tax deduction for amounts deposited into an IRA, up to a statutory ceiling. A few years later, Congress changed the law to eliminate the deduction for persons covered by certain types of retirement plan. This is an example of secondary retroactivity. Persons affected by the amendment could no longer deduct IRA contributions in the future, but the deductions they had taken in the past were not affected. (A purely prospective amendment would have applied only to new IRAs opened on or after the effective date of the amendment.) If Congress had attempted to invalidate deductions taken prior to the amendment, this would have been primary retroactivity.

It is generally accepted that. Congress can make its laws retroactive in either the primary or the secondary sense if retroactive application serves a rational legislative purpose, subject of course to constitutional limitations (such as due process and the impairment of contracts). See id. at 223; Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729-30 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–17 (1976). The same standard does not, however, apply to agency regulations.

There is no blanket prohibition on secondary retroactivity in agency regulations. The standard of review is the "arbitrary or capricious" standard of the APA. See Bowen, 488 U.S. at 220. With respect to primary retroactivity, however, the Bowen Court held that: .

"a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. " Id. at 208.

There may be some room for exceptions even from the strict proscription of the Bowen rule, based on a balancing of interests in a particular case. See Bowen, 488 U.S. at 224-25; Citizens to Save

Spencer County v. EPA, 600 F.2d 844,879-81 (D.C. Cir. 1979); Saint Francis Memorial Hospital v. Weinberger, 413 F. Supp. 323,332-33 (N.D. Cal. 1976). Reduced stringency may also be appropriate in the case of a policy statement,[14] or certain interpretative rules. [15]

Does the APA prohibit retroactive rulemaking? Thus far, the Supreme Court has not directly addressed the question. The court of appeals decision affirmed by the Supreme Court in Bowen held that it does. Georgetown University Hospital v. Bowen, 821 F.2d 750 (D.C. Cir. 1987). The Supreme Court's majority opinion did not discuss the APA, although Justice Scalia's concurring opinion expressly endorsed the circuit court's views.

The prohibition on retroactivity in rulemaking does not apply to adjudication. Bowen, 488 U.S. at 220-21 (concurring opinion). In the context of adjudication, retroactivity is measured against a standard of reasonableness and a balancing of interests. E.g., Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission, 606 F.2d 1094, 1116 n.77 (D.C. Cir. 1979), cert. denied, 445 U.S. 920 and 447 U.S. 922; NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966); Shell Oil Co. v. Kleppe, 426 F. Supp. 894,908 (D. Colo. 1977). As suggested above, the extent to which a balancing approach might justify exceptions from the Bowen rule with respect to regulations remains to be determined.

B. Agency Administrative Interpretations

1. Interpretation of Statutes

The interpretation of a statute, by regulation or otherwise, by the agency Congress has charged with the responsibility for administering it, is entitled to considerable weight. This principle is really a matter of common sense. An agency that works with a program from day to day develops an expertise which should not be lightly

[14] E.g., Iowa power and Light Co. v. Burlington Northern, Inc., 647 F.2d 796,812 (8th Cir. 1981), cert. denied, 455 U.S. 907.

[15] E.g., Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct. Cl. 1978) (first regulation promulgated under a statute).

disregarded. Even when dealing with a new law, Congress does not entrust administration to a particular agency without reason, and this decision merits respect. This, in addition to fundamental fairness, is why GAO considers it important to obtain agency comments wherever possible before rendering a decision. *b

In the often cited case of Udall v. Tallman, 380 U.S. 1, 16 (1965), the Supreme Court stated the principle this way:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "

When the agency's interpretation is in the form of a regulation with the force and effect of law, the "deference," as we have seen, is at its highest. The agency's position should be upheld unless it is arbitrary or capricious. There should be no question of substitution of judgment. If the agency position can be said to be reasonable or to have a rational basis within the statutory grant of authority, it should stand, even though the reviewing body finds some other position preferable.

When the agency's interpretation is in the form of an interpretative regulation, manual, handbook, etc.— anything short of a regulation with the force and effect of law—the standard of review is somewhat lessened, and it is here that the question of deference really comes into play. It is clear that a reviewing body "is not required to give effect to an interpretative regulation." Batterton v. Francis, 432 US. 416, 425 n.9 (1977). Yet, as the Court also instructed in Udall v. Tallman, there is an entitlement to deference.

Deference in this context is not some fixed concept, but is variable, depending on the interplay of several factors. The Supreme Court explained the approach as follows in Skidmore v. Swift& Co., 323 Us. 134, 140 (1944):

[16]GAO's desire for agency comments applies to audit reports as well as legal decisions. However, in view of the fundamental differences between the two products, the process differs. GAO's policy for audit reports is, at a minimum, to discuss the draft report with agency officials at an "exit conference." Depending on the results of the conference, written comments may or may not be requested, although GAO prefers to obtain written comments, especially when the report deals with sensitive or controversial issues The final report will then reflect the comments received and identify significant changes resulting from them. See generally 31 U.S.C.§ 718, For a legal decision, the agency's position on the legal issue(s) involved is solicited before a draft is ever written. For obvious reasons, draft legal decisions are not submitted for comment.

"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority [i.e., the statements in question were not regulations with the force and effect of law], do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. "

The basic premise that an agency interpretation is entitled to some largely undefined degree of deference is now settled. See, for example, in addition to the Tallman and Skidmore cases cited above, Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979); Batterton v. Francis, 432 U.S. 416, 424-25 (1977); General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976) (referring to the above-quoted passage from Skidmore as the "most comprehensive statement of the role of interpretative rulings"); West Coast Construction Co. v. Oceano Sanitary District, 311 F. Supp. 378, 383 (N.D. Cal. 1970).[17]

As noted above, the degree of weight to be given an agency administrative interpretation varies with several factors:

- The nature and degree of expertise possessed by the agency. Chrysler Corp., 441 U.S. at 315; Batterton, 432 U.S. at 425 n.9. To take a somewhat self-serving example, we like to think that GAO's expertise in appropriations matters merits a certain respect. E.g., International Union, UAW v. Donovan, 746 F.2d 855,861 (D.C. Cir. 1984), cert. denied, 474 U.S. 825; City of Los Angeles v. Adams, 556 F.2d 40,51 (D.C. Cir. 1977).
- The duration and consistency of the interpretation. United States v. Clark, 454 U.S. 555,565 (1982); Chrysler Corp., 441 US. at 315; Batterton, 432 U.S. at 425 n.9; Skidmore, 323 U.S. at 140; Theodus v. McLaughlin, 852 F.2d 1380, 1387 (D.C. Cir. 1988); Oceano, 311 F. Supp. at 383. While consistency may not always be a virtue, inconsistency will not help your case in court. E.g., Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987); Rowan Cos. v. United States. 452 U.S. 247.258-63 (1981); General Electric Co. v. Gilbert, 429 U.S. at 143. ' "

[17] The rule is hardly a new one. It has consistently been espoused by the Supreme Court for well over *a* century and a half. Some of the early cases are: United States v. Philbrick, 120 U.S. 52,59 (1886); Hahn v. United States, 107 US. 402,406 (1882); United States v. Pugh, 99 U.S. 265, 269 (187 S); United States v. Moore, 95 U.S. 760,763 (1877); Edwards v. Darby, 25 US. (12 Wheat.) 206,210 (1827).

- The soundness and thoroughness of reasoning underlying the position. Skidmore, 323 U.S. at 140.
- Evidence (or lack thereof) of congressional awareness of, and acquiescence in, the administrative position. United States v. American Trucking Ass'ns, 310 U.S. 534, 549-50 (1940); Helvering v. Winmill, 305 U.S. 79, 82-3 (1938); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 313-15 (1933): 41 Op. Att'y Gen. 57 (1950); B-114829-O. M., July 17,1974.

For illustrations of how GAO has applied the deference principle in decisions, see:

- 49 Comp. Gen. 510 (1970) (Department of Agriculture regulations under Meat Inspection Act).
- 48 Comp. Gen. 5 (1968) (Veterans Administration interpretation of statutory educational assistance allowance).
- 42 Comp. Gen. 467, 477 (1963) (long-standing Navy application of Buy American Act).
- B-205365, June 3, 1985 (Department of Energy's statement on duration of Residential Conservation Service program).
- B-21 1558, February 13, 1984 (statement of Federal Emergency Management Agency on eligibility for certain Disaster Relief Act assistance).
- A-51604, August 25, 1981, affirming A-51604, February 19, 1980 (Department of Agriculture regulations on administrative cost reimbursement under the Food Stamp Act).
- B-160573, June 6, 1967, affirming B-160573, January 17, 1967 (Office of Emergency Planning interpretation of coverage under the Federal Disaster Act).

The deference principle does not apply to an agency's litigating position unless that position is also expressed in the regulations, rulings, or administrative practice of the agency. Bowen v. Georgetown University Hospital, 488 U.S. at 212. It also does not apply to an agency's interpretation of a statute which is not part of its program or enabling legislation. United States Dep't of Justice v. Federal Labor Relations Authority, 709 F.2d 724,729 n.21 (D.C. Cir. 1983); Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280, 1286 n.29 (D.C. Cir. 1983).

As noted above, a regulation with the "force and effect of law" merits the highest degree of deference. In this connection, it is necessary to elaborate somewhat on the second Chrysler test—that

the regulation be issued pursuant to a statutory grant of authority. How specific must the statutory delegation be? Chrysler itself provides somewhat conflicting signals. In one place, in the course of listing the three tests, the Court gives as an example the proxy rules of the Securities and Exchange Commission. 441 US. at 302-03. These are issued under the explicit delegation of 15 U.S.C. § 78n, which authorizes the SEC to issue proxy rules. Yet in another place, the Court said:

> "This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued. " 441 U.S. at 308.

A sampling of case law suggests that the "force and effect of law" is more likely to be found where the delegation is explicit. For example, the Secretary of the Treasury has general authority to "prescribe all needful rules and regulations" to administer the Internal Revenue Code. 26 U.S.C. 57805. In addition, various other provisions of the Internal Revenue Code authorize the issuance of regulations dealing with specific topics. Regulations issued under the general authority of 26 U.S.C. § 7805—statutory though they may be—are not given the force and effect of law, and are accorded less deference than regulations issued under one of the more specific Provisions. United States v. Vogel Fertilizer Co., 455 US. 16, 24 (1982); Rowan Cos. v. United States, 452 U.S. 247, 252-53 (1981); McDonald v. Commissioner, 764 F.2d 322,328 (5th Cir. 1985); Gerrard v. United States Office of Education. 656 F. Supp. 570, 574 n.4 (N.D. Cal. 1987); Lima Surgical Associates v. United States, 20 Cl. Ct. 674,679 n.8 (1990).

Some other illustrative cases are:

- Homer v. Jeffrey, 823 F.2d 1521 (Fed. Cir. 1987) (provision of Federal Personnel Manual found to be interpretive only, because statute did not expressly authorize Office of Personnel Management to define term "military service").
- Fmali Herb, Inc. v. Heckler, 715 F.2d 1385, 1387 (9th Cir. 1983) (Food and Drug Administration regulation defining term "common use in food" held interpretive because FDA was not "instructed by statute" to define the term).

- St. Mary's Hospital, Inc. v. Harris, 604 F.2d 407 (5th Cir. 1979) (regulation issued under statute prohibiting disclosure of certain data "except as the Secretary . . . may by regulations prescribe" found to meet second Chrysler test).
- Intermountain Forest Industry Ass'n v. Lyng, 683 F. Supp. 1330, 1340-41 (D. Wyo. 1988) (second Chrysler test satisfied in case of published Forest Service timber management regulations where statutory delegation was not explicit, but this did not extend to plans developed under the regulations).

The question of deference to agency interpretations received considerable attention from the Supreme Court in the 1980's. Perhaps the most important case, one which we have not previously mentioned, is Chevron U. S. A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), a decision involving regulations of the Environmental Protection Agency under the Clean Air Act. The Court formulated its approach in terms of two questions. The first question is "whether Congress has directly spoken to the precise question at issue." Id. at 842. If it has, the agency must of course comply with clear congressional intent, and regulations to the contrary will be invalidated. Thus, before you ever get to questions of "deference," it must first be determined that the regulation is not contrary to the statute, a question of delegated authority rather than deference. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. " Id. at 843 n.9.

Once you cross this threshold, that is, once you determine that the "statute is silent or ambiguous with respect to the specific issue," the question becomes "whether the agency's answer is based on a permissible construction of the statute." Id. at 843. The Court went on to say:

> "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious. or manifestly contrary to the statute. [This presumably refers to regulations with the "force and effect of law," although the Chevron Court did not use that language.] Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. " Id. at 843-44 (footnotes omitted).

Reiterating the traditional deference concept, the Court then said that the proper standard of review is not whether the agency's construction is "inappropriate," but merely whether it is "a reasonable one." Id. at 844-45.

Three years later, in Immigration and Naturalization Service v. Cardoza-Fonseca, 480 US. 421 (1987), the Court revisited the issue. The majority opinion arguably removes statutory construction from the scope of the deference concept, and indicates that deference is required only when an agency is applying a standard to a particular set of facts. Id. at 446-48. In a separate opinion concurring in the judgment only, Justice Scalia sharply criticized the majority opinion for misapplying Chevron and for doing so gratuitously. Id. at 453-55.

The lower courts wasted little time in finding Cardoza-Fonseca to have effectively modified Chevron, rejecting deference on "pure questions of statutory construction. " E.g., Union of Concerned Scientists v. Nuclear Regulatory Commission, 824 F.2d 108 (D.C. Cir. 1987); Adams House Health Care v. Heckler, 817 F.2d 587 (9th Cir. 1987); International Union, UAW v. Brock, 816 F.2d 761 (D.C. Cir. 1987).

Before the ink on these decisions was dry, the Supreme Court spoke again in still another 1987 decision, NLRB v. United Food and Commercial Workers Union, 484 U.S. 112. The majority opinion indicates that, even under Cardoza-Fonseca, the two-step approach of Chevron continues to apply to a "pure question of statutory construction." 484 U.S. at 123. Justice Scalia wrote another concurring opinion, this time joined by three other Justices including the Chief Justice, applauding the return to Chevron and explicitly calling the three 1987 court of appeals cases cited above wrong. 484 U.S. at 133-34. A court of appeals case following this "latest" reading of Cardoza-Fonseca is Theodus v. McLaughlin, 852 F.2d 1380 (D.C. Cir. 1988). See also B-232482, June 4, 1990 (applying Chevron).

We began this chapter by noting the increasing role of agency regulations in the overall scheme of federal law. We conclude this discussion with the observation that this enhanced role makes continued litigation on the issues we've outlined inevitable. The proliferation and complexity of case law perhaps lends credence to Professor Davis' mild cynicism:

"Unquestionably one of the most important factors in each decision on what weight to give an interpretative rule is the degree of judicial agreement or disagreement with the rule. "[18]

2. Interpretation of Agency's Own Regulations

The principle of giving considerable deference to the administering agency's interpretation of a statute applies at least with equal force to an agency's interpretation of its own regulations. The Udall v. Tallman Court, after making the statement quoted at the beginning of this section, went on to state that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." 380 U.S. at 16.

Perhaps the strongest statement is found in a 1945 Supreme Court decision, Bowles v. Seminole Rock& Sand Co., 325 U.S. 410, 413-14:

"Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. "[19]

A good illustration of how all of this can work is found in B-222666, January 11, 1988. The Defense Security Assistance Agency (DSAA) is responsible for issuing instructions and procedures for Foreign Military Sales transactions. These appear in the Security Assistance Management Manual (SAMM). A disagreement arose between DSAA and an Army operating command as to whether certain "reports of discrepancy," representing charges for nonreceipt by customers, should be charged to the FMS trust fund (which would effectively pass the losses onto all FMS customers) or to Army appropriated funds. DSAA took the latter position. GAO reviewed the regulation in question, and found it far from clear on this point. The decision noted that "both of the conflicting interpretations in this case appear to have merit, and both derive support from portions of the regulation." However, while the regulation may have been complex, the solution to the problem was fairly

[18] 2 Administrative Law Treatise § 7:13 (2d ed. 1979).

[19] While this determines the controlling interpretation, the propriety Of that interpretation does not automatically follow. As the Court went on to caution in the very next sentence, "[t]he legality of the result reached by this process, of course, is quite a different matter." Bowles, 325 U.S. at 414.

simple. DSAA wrote the regulation and GAO, citing the standard from the Bowles case, could not conclude that DSAA's position was plainly erroneous or inconsistent with the regulation. Therefore, DSAA's interpretation must prevail.

See also Immigration and Naturalization Service v. Stanisic, 395 U.S. 62,72 (1969); San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (D.C. Cir. 1986); 63 Comp. Gen. 154 (1984); 57 Comp. Gen. 347 (1978); 56 Comp. Gen. 160 (1976); B-202568, September 11, 1981.

Just as with the interpretation of statutes, inconsistency in the application of a regulation will significantly diminish the deference courts are likely to give the agency's position. E.g., Murphy v. United States, 22 Cl. Ct. 147,154 (1990).

C. Administrative Discretion

"[S]ome play must be allowed to the joints if the machine is to work." Tyson& Brother v. Banton, 273 U.S. 418, 446 (1927) (Justice Holmes, dissenting).

Throughout this publication, the reader will encounter frequent references to administrative discretion. The concept of discretion implies choice or freedom of judgment, and appears in a variety of contexts. There are many things an agency does every day that involve making choices and exercising discretion.

One type of discretion commonly occurs in the context of purpose availability. A decision may conclude that an appropriation is legally available for a particular expenditure if the agency, in its discretion, determines that the expenditure is a suitable means of accomplishing an authorized end.

To put this another way, there is often more than one way to do something, and reasonable minds may differ as to which way is the best. The thing to keep in mind from the legal perspective is that if a given choice is within the actor's legitimate range of discretion, then, whatever else it may be, it is not illegal. For example, as we will see in Chapter 4, an agency has discretionary authority to provide refreshments at award ceremonies under the Government Employees Incentive Awards Act. Agency A may choose to do so while agency B chooses not to. Under this type of discretion, agency B's reasons are irrelevant. It may simply not want to spend the money. As a matter of law, both agencies are correct.

Another type of discretion is implicit in all of the preceding discussion of agency regulations. This type occurs when Congress charges an agency with responsibility for implementing a program or statute, but leaves much of the detail to the agency, In the course of carrying out the program or statute, the agency maybe required to make various decisions, some of which maybe expressly committed to agency discretion by the governing statute. Subject to certain fundamental concepts of administrative law, the agency is free to make those decisions in accordance with the sound exercise of discretion.

Under the Administrative Procedure Act, action which is "committed to agency discretion by law" is not subject to judicial review. 5 U.S.C. §701(a)(2). As the Supreme Court has pointed out, this is a "very narrow exception" applicable in "rare instances" where, quoting from the APA's legislative history, "statutes are drawn in such broad terms that in a given case there is **no** law to apply." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402,410 (1971). As noted, the "no law to apply" exception is uncommon, and most exercises of discretion will be found reviewable at least to some extent.

At this point, we should emphasize that these introductory comments are largely oversimplified; they are intended merely to lay a foundation for a discussion of the principles that follow.

1. Discretion Is Not Unlimited

To say that an agency has freedom of choice in a given matter does not mean that there are no limits to that freedom. Discretion does not mean unbridled license. The decisions have frequently pointed out that discretion means legal discretion, not unlimited discretion. The point was stated as follows in 18 Comp. Gen. 285,292 (1938):

> "Generally, the Congress in making appropriations leaves largely to administrative discretion the choice of ways and means to accomplish the objects of the appropriation, but, of course, administrative discretion may not transcend the statutes, nor be exercised in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation . ."

See also 35 Comp. Gen. 615,618 (1956); 4 Comp. Gen. 19,20 (1924); 7 Comp. Dec. 31 (1900); 5 Comp. Dec. 151 (1898); B-130288, February 27, 1957; B-49169, May 5, 1945; A-24916, November 5, 1928.

Discretion must be exercised before the obligation is incurred. Approval after the fact is merely a condoning of what has already been done and does not constitute the exercise of discretion. 22 Comp. Gen. 1083 (1943); 14 Comp. Gem 698 (1935); A-57964, January 30, 1935. (This point should not be confused with an agency's occasional ability to ratify an otherwise unauthorized act. See, for example, the discussion of quantum meruit claims in Chapter 12.)

One way to illustrate the concept of "legal discretion" is to visualize a person standing in the center of a circle. The circumference of the circle represents the limits of discretion, imposed either by law or by the difficult-to-define but nonetheless real concept of "public Policy ."[20] The person is free to move in any direction, to stay near the center or to venture close to the perimeter, even to brush against it, but must stay within the circle. If our actor crosses the line of the circumference, he has exceeded or, to use the legal term, "abused" his discretion.

When GAO is performing its audit function, it may criticize a particular exercise of discretion as ill-conceived, inefficient, or perhaps wasteful. From the legal standpoint, however, there is no illegal expenditure as long as the actor remains within the circle, We may also note that the size of the circle may vary. For example, as we will see in Chapter 17, government corporations frequently have a broader range of discretion than non-corporate agencies.

When Congress wishes to confer discretion unrestrained by other law, its practice has been to include the words "notwithstanding the provisions of any other law" or similar language. 14 Comp. Gen. 578 (1935). Even this is not totally unfettered, however. For example, even this broad authority would not, at least as a general proposition, be sufficient to permit violation of the criminal laws. Also, agency power to act is always bound by the Constitution. Short of an amendment to the Constitution itself, no statute, however explicit, can be construed to authorize constitutional violations.

In addition, depending on the context and circumstances, federal laws of general applicability maybe found to remain applicable.

[20] See, e.g., L'Orange v. Medical Protective Co., 394 F.2d 57 (6th Cir. 1968) (court may invalidate an act as "contrary to public policy" in the sense of being "injurious to the public," even where the act may not be expressly prohibited by statute).

E.g., D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1265 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (provision of Federal-Aid Highway Act directing construction of a bridge "notwithstanding any other provision of law" did not render inapplicable certain federal statutes regarding protection of historic sites).

An example of a statute permitting action without regard to other laws is 50 U.S.C. 51431, under which the President may authorize an agency with national defense functions to enter into or modify contracts "without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense." Provisions of this type are not self-executing but contemplate specific administrative determinations in advance of the proposed action. In other words, the "other provisions of law" continue to apply unless and until waived by an authorized official. 35 Comp. Gen. 545 (1956). See also 22 Comp. Gen. 400 (1942).

2. Failure or Refusal to Exercise Discretion

Where a particular action or decision is committed to agency discretion by law, the agency is under a legal duty to actually exercise that discretion. The principle has evolved, and now appears firmly established, that the failure or refusal to exercise discretion committed by law to the agency is itself an abuse of discretion. As the following cases demonstrate, the fact of exercising discretion and the particular results of that exercise are two very different things.

We start with a Supreme Court decision, Work v. Rives, 267 U.S. 175 (1925). That case involved section 5 of the Dent Act, 40 Stat. 1274, under which Congress authorized the Secretary of the Interior to compensate a class of people who incurred losses in furnishing supplies or services to the government during World War I. The Secretary's determinations on particular claims were to be final and conclusive. The statute "was a gratuity based on equitable and moral considerations" (id. at 181), vesting the Secretary with the ultimate power to determine which losses should be compensated.

The plaintiff in Rives had sought mandamus to compel the Secretary to consider and allow a claim for a specific loss, incurred as a result of the plaintiff's obtaining a release from a contract to buy land. The Secretary had previously denied the claim because he had interpreted the statute as not embracing money spent on real

estate. In holding that the Secretary had done all that was required by law, the Court cited and distinguished a line of cases—

"in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concealedly conferred on him by law. The relator [plaintiff] in such cases does not ask for a decision any particular way but only that it be made one way or the other." Id. at 184.

The Secretary had made a decision on the claim, had articulated reasons for it, and had not exceeded the bounds of his statutory authority. That was enough. A court could compel the Secretary to actually exercise his discretion, that is, to act on a claim one way or the other, but could not compel him to exercise that discretion to achieve a particular result.

In Simpkins v. Davidson, 302 F. Supp. 456 (S. D.N.Y. 1969), the plaintiff sued to compel the Small Business Administration to make a loan to him. The court found that the plaintiff was entitled to submit an application, and to have the SBA consider that application and reach a decision on whether or not to grant the loan. However, he had no right to the loan itself, and the court could not compel the SBA to exercise its discretion to achieve a specific result. A very similar case on this point is Dubrow v. Small Business Administration, 345 F. Supp. 4 (C.D. Cal. 1972). See also B-226121 -O. M., February 9, 1988, citing and applying these cases.

Another case involved a provision of the Farm and Rural Development Act which authorized the Secretary of Agriculture to forgo foreclosure on certain delinquent loans. The plaintiffs were a group of farmers who alleged that the Secretary had refused to consider their requests. The district court held that the Secretary was required to consider the requests, Matzke v. Block, 542 F. Supp. 1107 (D. Kans. 1982), "When discretion is vested in an administrative agency, the refusal to exercise that discretion is itself an abuse of discretion." Id. at 1115. The Court of Appeals for the Tenth Circuit affirmed that portion of the decision in Matzke v. Block, 732 F.2d 799 (10th Cir. 1984), stating at page 801:

"The word 'may', the Secretary 'may' permit deferral, is, in our view, a reference to the discretion of the Secretary to grant the deferral upon a showing by a borrower. It does not mean as the Secretary argues that he has the discretion whether or not to implement. the Act at all and not to consider any 'requests' under the statutory standards."'

The Comptroller General applied these principles in 62 Comp. Gen. 641 (1983). The Military Personnel and Civilian Employees' Claims Act of 1964 gives agencies discretionary authority to consider and settle certain employee personal property claims. An agency asked whether it had discretion to adopt a policy of refusing all claims submitted to it under the Act. No, the concept of administrative discretion does not extend that far, replied the Comptroller. While GAO would not purport to tell another agency which claims it should or should not consider—that part was discretionary-the decision noted that "a blanket refusal to consider all claims is, in our opinion, not the exercise of discretion" (id. at 643), and held "that an agency has the duty to actually exercise its discretion and that this duty is not satisfied by a policy of refusing to consider all claims" (id. at 645). Thus, for example, an agency would be within its discretion to make and announce a policy decision not to consider claims of certain types, such as claims for stolen cash, or to impose monetary ceilings on certain types of property, or to establish a minimum amount for the filing of claims. What it cannot do is disregard the statute in its entirety.

Additional cases illustrating this concept are California v. Settle, 708 F.2d 1380 (9th Cir. 1983); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971); and Jacoby v. Schuman, 568 F. Supp. 843 (E.D. Mo. 1983).

3. Regulations May Limit Discretion

By issuing regulations, an agency may voluntarily (and perhaps even inadvertently) limit its own discretion. A number of cases have held that an agency must comply with its own regulations, even if the action is discretionary by statute.

The leading case is United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). The Attorney General had been given statutory discretion to suspend the deportation of aliens under certain circumstances, and had, by regulation, given this discretion to the Board of Immigration Appeals. The Supreme Court held that, regardless of what the situation would have been if the regulations did not exist, the Board was required under the regulations to exercise its own judgment, and it was improper for the Attorney General to attempt to influence that judgment, in this case by issuing a list of "unsavory characters" he wanted to have deported. "In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its

decision in any manner." Id. at 267. Of course, the Attorney General could always amend his regulations, but an amendment could operate prospectively only.

Awards under the Government Employees Incentive Awards Act, as we will discuss in Chapter 4, are wholly discretionary. In a 1982 decision, GAO reviewed Army regulations which provided that "awards will be granted" if certain specified criteria were met, and noted that the Army had circumscribed its own discretion by committing itself to make an award if those conditions were met. B-202039, May 7, 1982. Reviewing Air Force regulations under similar legislation applicable to military personnel, the Court of Claims noted in Griffin v. United States, 215 Ct. Cl. 710, 714 (1978):

> "Thus, we think that the Secretary may have originally had uncontrolled and unreviewable discretion in the premises, but as he published procedures and guidelines, as he received responsive suggestions, as he implemented them and through his subordinates passed upon compensation claims, we think by his choices he surrendered some of his discretion, and the legal possibility of abuse of discretion came into the picture. "

More recently, the Comptroller General concluded in 67 Comp. Gen. 471 (1988) that the Farmers Home Administration had broad statutory authority to terminate the accrual of interest on the guaranteed portion of defaulted loans, but that it had restricted that discretion by certain provisions in its own regulations.

Another group of cases in this category are those, previously noted in Section A.1 of this chapter, in which an agency has waived an exemption from the APA and was held bound by that waiver.

For additional authority on the proposition that an agency can, by regulation, restrict otherwise discretionary action, see United States v. Nixon, 418 U.S. 683 (1974); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dunes, 354 US. 363 (1957); Sargisson v. United States, 913 F.2d 918,921 (Fed. Cir. 1990); California Human Development Corp. v. Brock, 762 F.2d 1044 (D.C. Cir. 1985); Griffin v. Harris, 571 F.2d 767 (3d Cir. 1978); McCarthy v. United States, 7 Cl. Ct. 390 (1985).

4. Insufficient Funds

Congress occasionally legislates in such a manner as to restrict its own subsequent funding options. An example is contract authority,

described in Chapter 2. Another example is entitlement legislation not contingent upon the availability of appropriations. A well-known example here is social security benefits. Where legislation creates, or authorizes the administrative creation of, binding legal obligations without regard to the availability of appropriations, a funding shortfall may delay actual payment but does not authorize the administering agency to alter or reduce the "entitlement."

In the far more typical situation, however, Congress merely enacts a program and authorizes appropriations. For any number of reasons—budgetary constraints, changes in political climate, etc.—the actual funding may fall short of original expectations. What is an agency to do when it finds that it does not have enough money to accommodate an entire class of beneficiaries? Obviously, it can ask Congress for more. However, as any program administrator knows, asking and getting are two different things, If the agency cannot get additional funding and the program legislation fails to provide guidance, there is solid authority for the proposition that the agency may, within its discretion, establish reasonable classifications, priorities, and/or eligibility requirements, as long as it does so on a rational and consistent basis.[21]

The concept was explained by the Supreme Court in Morton v. Ruiz, 415 US. 199, 230-31 (1974), a case involving an assistance program administered by the Bureau of Indian Affairs:

"[I]t does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. [Citations omitted.] Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries. "

[21] Even under an entitlement program, an agency could presumably meet a funding shortfall by such measures as making prorated payments, but such actions would be only temporary pending receipt of sufficient funds to honor the obligation. The recipient would remain legally entitled to the balance.

In Suwannee River Finance, Inc. v. United States, 7 Cl. Ct. 556 (1985), the plaintiff sued for construction-differential subsidy payments under the Merchant Marine Act, administered by the Maritime Administration. In response to a sudden and severe budget reduction, MarAd had cut off all subsidies for nonessential changes after a specified date, and had notified the plaintiff to that effect. Noting that "[a]fter this budget cut, MarAd obviously could no longer be as generous in paying subsidies as it had been before," the court held MarAd's approach to be "a logical, effective and time-honored method for allocating the burdens of shrinking resources" and well within its administrative discretion. Id. at 561.

Another illustration is Dubrow v. Small Business Administration, 345 F. Supp. 4 (C.D. Cal. 1972), noted above in our discussion of failure to exercise discretion. The SBA was administering a program of low interest loans under the Disaster Relief Act following an earthquake in Los Angeles County. During the last few months of the period SBA established for filing applications, the number of applications increased drastically, to the point where it became apparent that continuing to approve claims in the same ratio as past claims would far exceed available funds. Unable to obtain additional funding from Congress, SBA changed its guidelines to require a more stringent showing of need and a reasonable ability to repay. The court held that SBA had not acted arbitrarily nor abused its discretion.

An illustration from the Comptroller General's decisions is B-202568, September 11, 1981. Due to a severe drought in the summer of 1980, the Small Business Administration found that its appropriation was not sufficient to meet demand under the SBA's disaster loan program. Rather than treating applicants on a "first come, first served" basis, SBA amended its regulations to impose several new restrictions, including a ceiling of 60 percent of actual physical loss. GAO reviewed SBA's actions and found them completely within the agency's administrative discretion.

In a 1958 case, Congress had, by statute, directed the Department of the Interior to transfer $2.5 million from one appropriation to another. Congress had apparently been under the impression that the "donor" account contained a sufficient unobligated balance. The donor account in fact had ample funds if both obligated and unobligated funds were counted, but had an unobligated balance of only $1.3 million. Interior was in an impossible position. It could not

liquidate obligations in both accounts. If it transferred the full $2.5 million, some valid obligations under the donor appropriation would have to wait; if it transferred only the unobligated balance, it could not satisfy the entire obligation under the receiving account. First, GAO advised that the transfer would not violate the Antideficiency Act since it was not only authorized but directed by statute. As to which obligation should be liquidated first—that is, which could be paid immediately and which would have to await a supplemental appropriation—the best answer GAO could give was that "the question is primarily for determination administratively." In other words, there was no legally mandated priority, and all the agency could do was use its best judgment. GAO added, however, that it might be a good idea to first seek some form of congressional clarification. 38 Comp. Gen. 93 (1958).

An early case, 22 Comp. Dec. 37 (1915), considered the concept of prorating. Congress had appropriated a specific sum for the payment of a designated class of claims against the Interior Department. When all claims were filed and determined, the total amount of the allowed claims exceeded the amount of the appropriation. The question was whether the amount appropriated could be prorated among the claimants.

The Comptroller of the Treasury declined to approve the prorating, concluding that "action should be suspended until Congress shall declare its wishes by directing a pro rata payment. . . or by appropriating the additional amount necessary to full payment." Id. at 40. If the decision was saying merely that the agency should attempt to secure additional funds—or at least explore the possibility—before taking administrative action which would reduce payments to individual claimants, then it is consistent with the more recent case law and remains valid to that extent. If, however, it was suggesting that the agency lacked authority to prorate without specific congressional sanction, then it is clearly superseded by Morton v. Ruiz and the other cases previously cited. There is no apparent reason why prorating should not be one of the discretionary options available to the agency along with the other options discussed in the various cases. It has one advantage in that each claimant will receive at least something.

A conceptually related situation is a funding shortfall in an appropriation used to fund a number of programs. Again, the agency

must allocate its available funds in some reasonable fashion. Mandatory programs take precedence over discretionary ones.[22] Within the group of mandatory programs, more specific requirements should be funded first, such as those with specific time schedules, with remaining funds then applied to the more general requirements. B-159993, September 1, 1977; B-177806, February 24, 1978 (non-decision letter). These principles apply equally, of course, to the allocation of funds between mandatory and nonmandatory expenditures within a single-program appropriation. E.g., 61 Comp. Gen. 661,664 (1982).

Other cases recognizing an agency's discretion in coping with funding shortfalls are Los Angeles v. Adams, 556 F.2d 40,49-50 (D.C. Cir. 1977), and McCarey v. McNamara, 390 F.2d 601 (3d Cir. 1968).

[22] A "mandatory program," as we use the term here, should not be confused with the entitlement programs previously noted. A mandatory program is simply one which Congress directs (rather than merely authorizes) the agency to conduct, but within the limits of available funding. Entitlement programs would take precedence over these "mandatory" programs.